OUR ANTIQUATED METHOD OF ELECTING A PRESIDENT.

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BEFORE the inhabitants of the United States retired to rest on the evening of Tuesday, November 8th last, it was heard on all sides that Theodore Roosevelt had been elected President of the United States. A visitor unacquainted with our Constitution, listening to the talk of our citizens, would never have suspected that he was witnessing anything else than an election of a President by the people, who had proceeded on the same system as if they had been electing the Governor of a State. Of course, we all know that a President was not elected, nor even voted for, on November 8th, and that the election will not occur until Monday, January 9th, when the electors will meet in their several States to cast their votes. But few of us reflect how devoid of legal force is the mandate of the people as expressed on November 8th, and how completely all responsibility for the choice of a President is vested in a body of men who will not have met even up to the time when this article shall be published. We have fallen into the habit of thinking of the actual election as a mere formality, like the counting of a vote on a specified day some weeks after an election. It may, therefore, be wholesome to point out how far this way of thinking is wrong, and what danger may arise at any time by the continuance of what we are too apt to regard as a mere formality.

The men who framed our Constitution found the task of devising a satisfactory method of electing a President to be one of great difficulty. It was believed that any system which provided for the direct choice of a President by a vote of the people at large would produce a degree of popular excitement "subversive of the order and peace of society." As late as 1823, it was still a ques-

tion whether some danger of this kind might not result from the direct choice even of electors by the people. The plan which commended itself to the Convention was, therefore, one by which the President should be chosen by a selected body of men, removed as far as possible from sinister influences, either on the part of the public on one side, or on the part of foreign emissaries—that great bugbear of the founders of our Constitution—on the other. It was not thought safe to have the electors meet as a single body, because the latter class of influences could then be most easily directed against them. Their choice was, therefore, made exclusively a function of the several States, the legislators of which were quite at liberty to make the choice themselves, or to have the electors voted for by the people. It is noteworthy that the latter system did not become universal until after our Civil War, the State of South Carolina, at least, up to that time providing that the choice should be made by its Legislature.

The preceding and other considerations are very fully set forth by Hamilton in "The Federalist." It is of especial interest to notice how careful the framers of the Constitution were to protect the electors from being tampered with in advance, and to prevent the votes of one State from being influenced by those of another. The electors were to be free from suspicion of too great devotion to the President in office. Hence no Senator, Representative nor other person holding a place of trust or profit under the United States, could be an elector. Hence, also, they were to meet on the same day in all the States. It would thus be "found no easy matter to suddenly embark them, dispersed as they would be over thirteen States, in any combinations founded upon motives which, though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty."

Some results of these precautions are not without interest at the present moment. One is that there is as yet no candidate for the Presidency legally entitled to recognition on January 9th. Under our present system of official ballots, political parties are recognized, whose candidates as Governor, legislators and members of Congress are legally entitled to have their names printed on the ballot. But there are no such candidates for the position of President and Vice-President, because the people have no vote for these officers, and the States vote for them in a way distinct

from that in which they elect their State officers. The fact that the two great parties met in convention last June, and there nominated candidates for the Presidency, can therefore give these candidates no standing whatever before the Electoral College.

It follows that the men who are to meet on January 9th to elect a President are free agents to exercise their own discretion as to whom they shall choose. Should one, or any number of them, vote for other candidates than Parker or Roosevelt, their votes will be valid, always granting that they were not secured by bribery or corruption. Should they so vote in sufficient number to secure a majority for some other candidate, that majority will make him who secures it the legal President. The case would not be like that of an inspector making a wrong statement of a vote, a canvassing officer falsifying his returns, or a Governor giving certificates to the wrong party. A complete answer to any complaint that an elector did not cast his vote for the candidate who had been nominated by his party would be, that under the Constitution the election of the President was confined to his judgment; and he was bound to exercise that judgment according to his own conscience. He could plead in addition that, the vote being by ballot, there was no knowledge on the part of any one but himself as to how he had voted.

Our confidence that every one of the electors chosen will cast his ballot as we expect him to do is one of the most remarkable tributes that we can pay to the high standard of good faith which marks our politics. In the election of 1876, confidence in this standard was put to the severest test which it could be conceived to undergo. Although the circumstances must still be fresh in the minds of at least the older of our readers, it is worth while to mention the main point. Samuel J. Tilden had received, for President, a decided majority of the popular vote. Electoral votes of unquestioned legality, to a number just one short of the majority which would elect him, were to be cast. In the balance were the votes of three States, Florida, Louisiana and Oregon, the legality of which was at issue. Should all these votes be counted for Hayes, he would be elected by a majority of one; but, should a single vote fail, Tilden would be the legally elected President. In Louisiana especially was the position of the Tilden electors strong. There was no question that they had received a majority of the legal votes cast; but the canvassing

officers, acting under a provision of the Constitution which allowed them discretion in the matter, had thrown out votes in a sufficient number of counties and precincts, on the score of intimidation and violence, to give a majority to the Hayes electors. But in Oregon the Governor had given the certificates to the Tilden electors, when the returns showed that the Hayes electors had received a majority. It therefore required close steering between Scylla and Charybdis to give the votes of both States, as well as of Florida, to Hayes; the one in pursuance of the State certificates, the other in opposition to them.

Under these circumstances, if a single one of the Republican electors cast his vote for Tilden, the latter would be the legally elected President, as he was the choice of a majority of the people. A strong appeal was made that some one of the electors should exercise his legal discretion, and make Tilden the President. In addition to all the other reasons for doing this was the important one that a contest which might shake our institutions to their base would thus be avoided. The appeal was supposed to have been addressed especially to James Russell Lowell, one of the electors of Massachusetts. Yet, neither he nor any other Republican elector could be moved from the stand that the responsibility rested not with them, but with the people. They had been chosen to cast a certain vote, and they were bound to do it, no matter that the majority of the voters were against them, and that the gravest dangers were to result. It was the business of the people to guard against the danger.

The merited confidence which experience leads us to place in the good faith of the electors should not blind us to the contrast between the antiquated ideas on which the constitutional method of electing a President was framed, and the actual facts of to-day, more than a century later. The certainty of the foreordained result shows that the intervention of the electors is, at best, a useless formality. To dispense with them, we have only to adopt a constitutional provision putting into legal shape the method actually adopted by the people on the evening of an election in determining who is to be elected. Each State has a number of votes for President equal to the whole number of Senators and Representatives to which it is entitled in the Congress. The qualified citizens in each State are invited to cast their votes for President, precisely as they now do for Governor or State officers.

The votes are counted, canvassed and certified to the Executive of the State. Disputes as to validity are determined by the State judicial or other authorities, as at present. The candidate for President having the plurality of votes receives the number of votes to which the State is entitled. The Executive certifies the vote of the State to the President of the Senate, as he now certifies the names of the electors. The certificates are opened in joint session of the two houses of Congress, the votes of the several States added up, as the electoral votes now are, and the result determined on the present system, if we choose to continue it.

The feasibility of this change is not open to question. Its urgency can be questioned only on the ground that, even if the electors are useless, they are also harmless so long as they execute the will of the people who choose them. This view would be quite sound were there no possibility of a failure in the complicated processes to which their functions give rise. But the very provisions and limitations to which the electors are subject may cause slips in the proceedings, of which we have occasional examples. The first difficulty is that, at law, the electors are responsible agents in the election. The Constitution itself, in treating the electors as alone responsible for their choice, places limitations on them, each of which is a source of possible failure. They must be citizens of the United States, though this is not expressly provided. They must hold no office of profit or trust under the United States. And they must all meet on the same day to cast their votes. It follows that the vote of any elector, when it comes before the joint session, may be challenged on the ground that the elector was not a citizen of the United States, or that he held some office of profit or trust. Of course, the greatest care is always taken by those who frame the ticket that there shall be no room for any such challenge. But it is impossible to avoid all chance of ineligibility.

Yet more serious than this is the provision that the votes shall all be cast on the same day. In 1856, when Buchanan and Fremont were the candidates, a heavy snow-storm prevented the electors of Wisconsin from meeting on the same day with the others, as prescribed by the Constitution. The question whether their votes were valid was left unsettled at the joint session, because the result was the same whether they were counted or not, and the joint session did not wish to assume the responsibility of

a decision. But, if the result had depended on the vote of Wisconsin, a decision would have been necessary. The question whether a failure to comply with a constitutional provision invalidates a vote cast under it, is one in which the general trend of custom tends toward the affirmative. Counts of precincts are thrown out on formalities much less serious than this. Should such a circumstance again occur, and should the election be close enough to turn on the vote of a State, the decision would probably be a purely partisan one. How great an evil this would be is shown by the demoralizing result of the election of 1876.

It is true that this danger is lessened by a provision of law in some or all of the States that, if all the electors are not assembled at the appointed time, those actually present may fill vacancies. But this does not wholly do away with the danger. If no electors at all are present, which might well be the result of such a snowstorm as sweeps down from the northwest every few years, there will be no one with authority to fill vacancies. Moreover, in so hurried a choice, the danger that an ineligible elector may be taken is very great. It is all the greater because of the purely perfunctory character of the duties devolving upon them, which is liable to result in forgetfulness as to the constitutional qualifications.

We sometimes smile at the antiquated proceedings which accompany the accession of a monarch to a throne—such as the proclamation of a herald announcing the change. But we are far ahead of this in our adherence to our antiquated system of electing a President. To make the cases parallel, we must suppose that the discovery, by a Parliamentary Commission, that the herald who made the proclamation was not a liege subject of our Lord the King, would result in a question whether the latter was legally proclaimed, and had the right to mount the throne.

All this presupposes that the ballots have been prepared and cast in due form by the qualified voters of the several States. But we have, in addition to all this, to consider the danger arising from the voter's failing to understand exactly what he must do in order to make his official ballot valid for all of the electors. Where only a single candidate for each office is to be chosen, this involves little difficulty, now that the system is well understood by nearly all the voters of all the States. But when it comes to choosing a large number of electors on the same ballot, the

danger of failure increases. We now have before us the case of Maryland in the recent election, where it is scarcely yet known for whom the vote of the State would have been cast, had all the voters understood the ballot. Such cases of a divided electoral vote are quite frequent. The personal popularity or unpopularity of a candidate for elector may decide the question whether he shall receive a majority of the votes. All this would be done away with if the President and Vice-President were voted for directly. The conclusion to which we are led is that a constitutional amendment doing away with the electors, and providing a direct vote for President and Vice-President, is urgently necessary to avoid the constantly recurring danger of an election being vitiated through accidents, or failure in carrying out antiquated and useless formalities.

While the mere doing away with the electors would certainly be a great improvement, we should not be satisfied with anything less than the adoption of a reasonably good system. The present one is subject to the objection that the entire vote of a State may be determined in one direction or the other by a very small number of votes. The case of New York in 1884, when the question whether Cleveland or Blaine should be President turned upon the 35 votes of New York State, and when the decision in favor of Cleveland rested only on a majority of about 1100 votes in that State, is fresh in our minds. In the general average there is about one electoral vote for every forty thousand voters. But here was a case in which 35 electoral votes and the Presidency itself were determined by six hundred voters. This ought not to be, and there is no necessity that it should be. It is quite true that, in any election, the majority may be ever so small on one side or the other. But a close election is much less likely to occur where the number of voting units is very large than where it is small.

Our inattention to possible dangers from this source is curiously shown by a circumstance of the Presidential election of 1888. The candidates were then Cleveland and Harrison. New York was carried by the Democrats on the State ticket, electing David B. Hill as Governor. But, by causes which have never been satisfactorily explained, the Presidential vote was in favor of Harrison instead of Cleveland. Among the other States the electoral vote was so evenly divided that, had New York voted for

Cleveland, the whole election would have turned upon the vote of West Virginia. This was so close that it was not known for several days after the election. Consequently, in the case supposed we should have had something very like a repetition of the Tilden-Hayes contest of twelve years before. It must be remembered that the law of 1889, which was designed to provide more clearly than had previously been done for contested cases, was not yet enacted. No doubt, had the conjuncture arrived, we should have devised a way out of it, as we did in 1876. But a system under which such contests are bound to occur with great frequency ought to be done away with. To devise a more rational system, let us look into the question from another point of view.

The simplest method of electing a President would be by a count of the popular vote of the entire country, regardless of State lines. The proper authorities in every State certify to a central authority how many votes were cast by the voters of that State for each candidate. The candidate found to receive a majority of the whole number would be declared elected. If no candidate has a majority, the proceedings may be the same as at present in the case of no candidate receiving a majority of the electoral vote; if we choose to continue that part of the system.

An objection to the choice by count of the popular vote, pure and simple, is that the large States, and the States having large majorities for one party, would exercise too great an influence in the election. As a constitutional amendment must receive the votes of three-fourths of the States, it may be assumed that the smaller States would object to an amendment which increased the preponderance of the larger ones over them.

But there are several intermediate systems between a general count of the entire popular vote and a count by States pure and simple. The best of these intermediate systems is that of combining States and Congressional districts. At the present time, the people of each district vote for members of Congress. They could, on the same ballot, vote for President and Vice-President. Then, in each district, the candidate receiving a plurality of the votes would be entitled to have the one vote of that district counted for him. Besides this, the State would be entitled to two electoral votes, determined by the majority of the entire State. When, as is sometimes the case, one or more representatives are chosen by the State at large, each State would be entitled to an

equal number of electoral votes for President and Vice-President. This would give to each State precisely the power it now has; only, instead of that power being determined by never so small a majority in each State, it would be divided among the Congressional districts. The voting units would be smaller. The preponderance of the larger States would be lessened rather than increased, so that the smaller States would have fully the influence they now have. Such States as New York and Pennsylvania, instead of voting "solid" as they now do, would be sure to give a few Congressional districts to the other party, just as they elect a few members of Congress for the minority.

The change from the present system is so slight that it could be put into operation without difficulty. The votes in each Congressional district would be counted and certified to the authorities of the State, as they are now. The Presidential candidate of each district would be determined by the vote of that district; that of the State by the entire vote. These votes would be certified by the Executive to the President of the Senate, and counted in joint session, as the electoral votes now are.

This system seems to be the best and easiest that can now be adopted. But there still remains a defect in our present system, which would be worth curing at the same time. The Constitution provides that if no Presidential candidate receives a majority of the electoral vote, the choice between the three highest candidates devolves upon the Representatives, each State voting separately. A majority of all the States is now necessary to a choice. A State equally divided between two candidates would be left out from a majority, but would have to be counted in the whole number. The chances would, therefore, be against any election by the House, in the frequent case of a close division of parties. The Vice-President, chosen by the Senate, would then fill the office. But, even here, the possibility of failure would be very serious. A majority of the entire Senate, vacancies included, is necessary to the choice of a Vice-President. Vacancies and absentees sufficient in number to prevent a majority would be very possible. Then the fourth of March would arrive without a constitutional President.

The simplest way of guarding against this danger is by providing that a plurality of what we now call the electoral vote shall determine the choice of President and Vice-President. The ob-

jections to this course have greatly diminished since the date of the adoption of the Constitution. It is a wholesome rule that, if a sufficient number of the minority cannot agree upon a candidate, the majority should rule. In any case, the evil of plurality rule is less to be dreaded than the danger of a non-election, which the majority rule might lead to.

It is undeniable that we are continuing an antiquated system of electing a President and Vice-President, fraught with wholly unnecessary and cumbrous formalities which may lead at any time to the defeat of the popular will or, worse yet, to a contest over the validity of an election. We have, up to the present time, been blind to all our narrow escapes from the danger. There is no real difficulty in devising and adopting a better system. Our hesitation only arises from a supposed sentiment against amending our Constitution. In view of the fact that the Constitution itself makes provision for amendments, there can be no rational ground for this sentiment. It is the spirit, not the letter, of our Constitution which has made it so successful in solving the greatest political problems with which our race ever had to deal, and in showing the world how civilized peoples may be governed. We only weaken this spirit, and do no honor to the Constitution or its founders, when we refuse to amend it in the way the document itself provides. To make the case against amendments weaker we have, during the present generation, strained the elasticity of the document to a degree which it would never have borne, were it not for the broad good sense of our Supreme Court in recognizing the fact that new conditions demand new constructions of law. Far from amending the Constitution being a source of danger, our willingness to do it will afford the surest guarantee of the perpetuity of the instrument, as well as show to the world that, in our national proceedings, we are not tied down by a blind and irrational adherence to antiquated forms of procedure.

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